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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

—  
No. 412  
—

ERVIN HOWELL and RAYMOND EARL GUTERMUTH, *Petitioners*  
and *Appellants below*,

v.

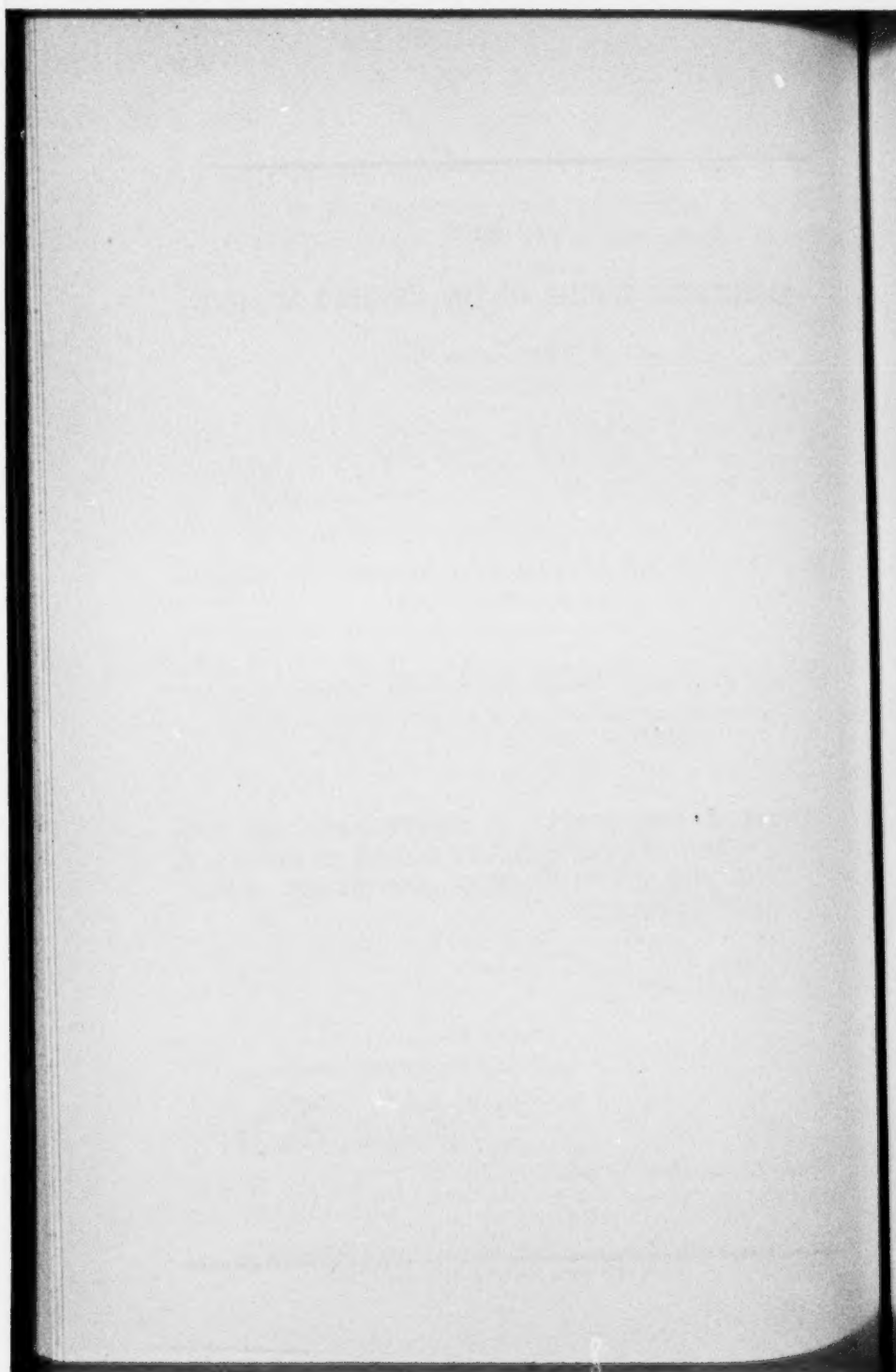
ROYDEN O. COUCH, Doing Business as COUCH MANUFACTURING COMPANY, *Respondent and Appellee below*.

—  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT, AND BRIEF IN SUP-  
PORT THEREOF.**  
—

ERVIN HOWELL,  
RAYMOND EARL GUTERMUTH,

By FRANCIS G. BOSWELL,  
*Counsel for Petitioners.*

Dated September , 1942,  
Washington, D. C.



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**PETITION FOR WRIT OF CERTIORARI TO THE  
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*To the Honorable Harlan Fiske Stone, Chief Justice of the  
United States, and the Associate Justices of the  
Supreme Court of the United States:*

Your Petitioners present herewith a certified transcript from the United States Circuit Court of Appeals for the Fifth Circuit of Case No. 10150 appearing on their docket as Ervin Howell et al., Appellants, versus Royden O. Couch, doing business as Couch Manufacturing Company, Appellee; and in support of this petition respectfully show as follows:



## I

**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

This is a civil action filed in the District Court for the Southern District of Florida, Miami Division, by the Respondent herein on July 24, 1940, in which the complaint charged your Petitioners and others with infringement of United States Letters Patent No. 1,893,614, granted to the Respondent on January 10, 1933. The complaint alleged both constructive and actual notice of infringement, and demanded a perpetual injunction restraining your Petitioners and a reference to a master to report an account of damages and profits. (R. 7 to 10)

Your Petitioners answered, admitting both forms of notice, but denied the main allegations of the complaint and set up the defenses of invalidity and non-infringement. (R. 11 to 14)

Prior to the trial your Petitioners propounded interrogatories to the Respondent in the answers to which the Respondent put in issue claims 1, 2 and 4 of his patent. (R. 149, No. 4)

Also prior to trial, the Respondent took depositions under Federal Rule 26, calling your Petitioners whose examinations are a part of the evidence submitted by the Respondent. (R. 95 to 132)

The trial was by the court without a jury and the Respondent's evidence comprised the testimony of two witnesses as to the practical value of the invention, (R. 16 to 30) the testimony of the Respondent, himself, (R. 32 to 64) and the testimony of an expert, Morton. (R. 64 to 94) The Petitioners' evidence included a certified copy of the file contents of the patent in suit, (R. 158 & 248) copies of prior patents which it is contended show lack of patentable invention in the patented device, (R. 158 & 301 to 333) and the testimony (R. 134 to 137) and exhibits (R. 139 & 141 & 291 to 294) of a sole witness, Anderson, as to the prior



state of the art, Anderson's testimony having been introduced to show also that the combination installed by your Petitioners was old before the Respondent's date of invention. (The Anderson model, Def. Ex. No. 5, is a large physical exhibit and a drawing disclosing it appears opposite page 10.)

Judgment was rendered for the Respondent on findings of fact and conclusions of law (R. 178 to 190) which were not based on any independently expressed opinion of the trial judge but were merely his endorsement of those prepared and submitted by Respondent's counsel. The decree (R. 190) held all of the claims in issue valid and infringed and granted the demands of the Respondent.

Notice of appeal (R. 192) was duly filed and the case, in due course, came on for hearing before the Circuit Court of Appeals for the Fifth Circuit before whom it was argued, as in the trial court, that the patent is invalid, that your Petitioners have not infringed it, and that the testimony of Anderson has the necessary probative force to show non-infringement regardless of any other considerations in the case.

The Fifth Circuit Court of Appeals handed down an opinion (R. 336) in which they held claims 1 and 4 not to be infringed, (R. 338) thus reversing the trial court with respect to these claims, and in which they expressed doubt on the validity of claim 2 but, on the conclusion that the Respondent had made a practical advance, resolved the doubt in his favor and held that claim valid and infringed. (R. 338)

A duly filed petition for rehearing was denied without opinion. (R. 339)

The construction charged to be an infringement of the patent consists of a pump unit and a so-called foundation therefor, the latter being made up of two spaced parallel concrete walls disposed in the center of a canal in the direction of the length thereof and connected by a concrete platform or deck elevated from the bottom of the canal. Di-

vergent wing walls extend from the ends of the parallel walls to the canal banks, so that the canal is constricted at the point of installation.

The pump unit is mounted on the platform or deck and extends through an opening in the same, thus disposing its intake below and its discharge above the deck.

Flashboards slidable in guide grooves in the parallel walls constitute the means by which, by proper adjustment, water is admitted selectively from either side of the foundation below the deck and transferred through the pump to the opposite side of the foundation from that at which it is admitted. While water always passes through the pump in the same direction, such flashboard adjustment can be made as will permit the water level on either side of the foundation to be raised or lowered. (R. 297, 298, 299) It is because of this that the term, "Reverse Flow Pump," has come into use.

In the construction shown in the Respondent's patent (R. 216) the pump unit is within a metal cylinder and, according to the specification, (R. 220, line 10 et seq.) has its conduit 26, at the upper margin, "extended horizontally to provide a partition or diaphragm 27" which divides the cylinder into upper and lower chambers, admission into and discharge from which is made possible by gate controlled openings in the cylinder arranged a plurality above and a plurality below the diaphragm, the openings in each plurality being angularly related. The so-called reverse flow thus is made possible when the pump is installed as a dam in an irrigation and drainage canal.

The record does not indicate that the Respondent installed more than one pump like that shown in his patent and that was at the State Experimental Station, Belle Glade, Florida. His commercial product is like that of your Petitioners when installed; and, as a manufacturer, he makes only the unpatented pump unit (R. 337, lines 12 & 13) to which he applies the patent notice. (R. 40 & 41). The foundation, except by special arrangement, the pur-

chaser must, himself, have installed which he may do with the aid of plans furnished by the Respondent as part of the latter's service. (R. 36 & 37)

Your Petitioners operate in the same manner (R. 106) and the pump which they manufacture for the so-called reverse flow use they employ in their culvert type of pump. (R. 133) And the culvert type of pump and reverse flow pump unit alone are admitted by the Respondent not to be infringements. (R. 152 & 153)

## II.

### JURISDICTION.

1. The jurisdiction of this Court arises by reason of the provisions of paragraphs (a) and (c) of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, sec. 347); and also by reason of paragraph (a) of Section 8 of the Act of February 13, 1925, (U. S. C., Title 28, sec. 350)

2. The judgment to be reviewed was given in an opinion of the Fifth Circuit Court of Appeals under date of May 22, 1942 (R. 336); and a timely filed petition for rehearing was denied in an order dated July 2, 1942. (R. 339)

3. The judgment of the Circuit Court of Appeals was rendered in a civil action under the patent laws of the United States on the issues of validity and infringement of letters patent of invention. That judgment so far rejected the Appellate Court's own criterion of patentable invention as well as the criterion of this Court, so applied the doctrine of equivalents and the rule of disclaimer by amendment, and so treated your Petitioner's evidence as to give validity and breadth to an obviously invalid patent and thus to impose upon the public in the State of Florida, the only place where the alleged invention is used, the payment of a tribute to the Respondent for something which for years they have had the right to use unrestrictedly.

4. The cases, among others, believed to sustain jurisdiction are as follows:

*Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47.

*Chicago Coin Machine Co. v. Ace Patents Corporation*, 315 U. S. —; 62 Sup. Ct. Rep. 513.

*Muncie Gear Works v. Outboard Marine and Manufacturing Co.*, — U. S. —; 62 Sup. Ct. Rep. 865.

### III

#### THE QUESTIONS PRESENTED.

The decision of the Circuit Court of Appeals raised the following questions:

1. Does it constitute patentable invention to apply to an irrigation and drainage pump the old expedient that will permit pumping selectively from anyone of a plurality of sources and discharging selectively into any one of several reservoirs where the only necessary modification of an old device is the duplication of the admission means of the latter?

2. Is the maker or user of the accused apparatus an infringer of the patent

(a) Where the claims in suit describe the division wall as a "transverse diaphragm, the opening in which communicates with said conduit", or in variations of that expression, when the diaphragm has no defined opening but is an integral part of the conduit formed as a horizontal flanged extension of the upper end thereof; and where, in the alleged infringement, the division wall is a concrete deck actually formed with an opening in which the conduit is disposed to extend partly below and partly above the same? or

(b) Where the claims in suit prescribe a plurality of "angularly related" or "angularly disposed" inlet and outlet openings in the external housing above and be-

low the diaphragm; and where, in the construction charged to infringe, the supposed external housing is merely two parallel walls and the openings are the space between them at their opposite ends? or

(c) Where the patent is held to be of narrow scope and the alleged infringers use flashboards spanning the parallel walls instead of the gates prescribed by the patent when the single common function of the two is that of independent adjustability and when the former admittedly have certain functions and advantages not possible in the latter?

3. Is the testimony of Anderson to be rejected as failing to establish what he did and the date of his doing it

(a) Where he had an actual working model which demonstrated his construction in every detail; and

(b) Where he produced from his records the ledger sheet of the transaction with Primola Farms which refreshed his memory as to the date; and

(c) Where the Respondent's counsel sought, without objection on Petitioner's part, and secured the right to offer testimony in rebuttal to Anderson's and failed to do so; and

(d) Where the findings of fact, in the face of this omission on the part of the Respondent, speculated on the truthfulness of Anderson's testimony as to what he did; and

(e) Where the trial court made a finding of fact giving the Respondent a date of disclosure prior to Anderson's stated date of the Primola Farms installation, basing that finding on the Respondent's own statement alone, given in rebuttal and unsupported with any documentary or other evidence and at variance with the date testified to in his testimony-in-chief?

## IV.

**REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.**

1. The decision of the Fifth Circuit Court of Appeals has sustained as valid and infringed a patent which has not heretofore been litigated but which, by reason of the decision, will now dominate an entire industry confined wholly within the State of Florida, thus making improbable any future litigation involving the patent before any other federal court of equal dignity.

2. The decision of the Fifth Circuit Court of Appeals, sustaining the validity of the claims in suit on the presumption of validity attaching to the patent grant and on doubtful proof of commercial success of the patented invention when the only difference over an old device is the provision of a plurality of selectively controlled inlets in place of one, is a rejection of this Court's criterion of patentable invention and is, therefore, a decision in conflict with applicable decisions of this Court.

3. The decision of the Fifth Circuit Court of Appeals, sustaining infringement of claim 2 and regarding it as having breadth, is a decision so applying the doctrine of equivalents and the rule of disclaimer by amendment and originally incorporated limitations as to be in conflict with applicable decisions of this Court.

4. The decision of the Fifth Circuit Court of Appeals, refusing to give weight to the public use testified to by Anderson because it rests on his sole testimony as to time when he had tangible evidence to support his date, as well as what he had at that date and when the trial court found it necessary to make a finding of fact giving the Respondent an earlier date, is a decision in direct conflict with applicable decisions of this Court.

## V.

**PRAYER.**

Wherefore your Petitioners pray that this application for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the cause entitled on their docket, No. 10150, Ervin Howell et al, Appellants versus Royden O. Couch, doing business as Couch Manufacturing Company, Appellee, be granted; that the clerk be directed to enter an order to that effect and forthwith notify the Fifth Circuit Court of Appeals and counsel of record of the granting of the application; that the order direct that the certified transcript filed herewith be treated as though sent up in response to a formal writ to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States; that the judgment herein of the Fifth Circuit Court of Appeals be reversed by this Court; and that your Petitioners be given such further relief as to this Court may seem proper.

ERVIN HOWELL,  
RAYMOND EARL GUTERMUTH,

By FRANCIS G. BOSWELL,  
*Counsel for Petitioners.*

Dated September 22, 1942,  
Washington, D. C.



**AFFIDAVIT IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

State of Florida, County of ....., ss:

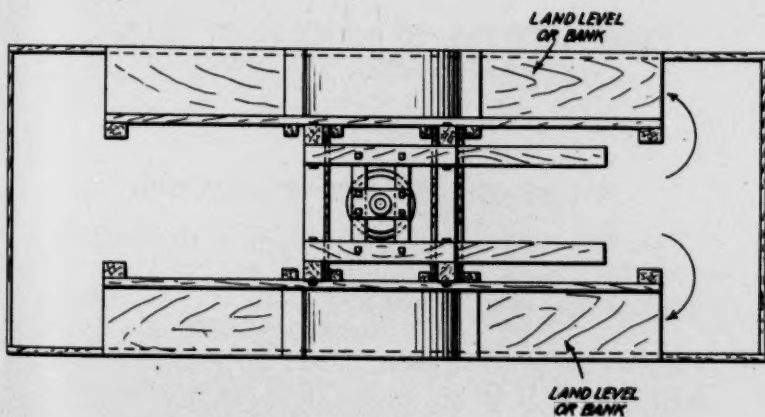
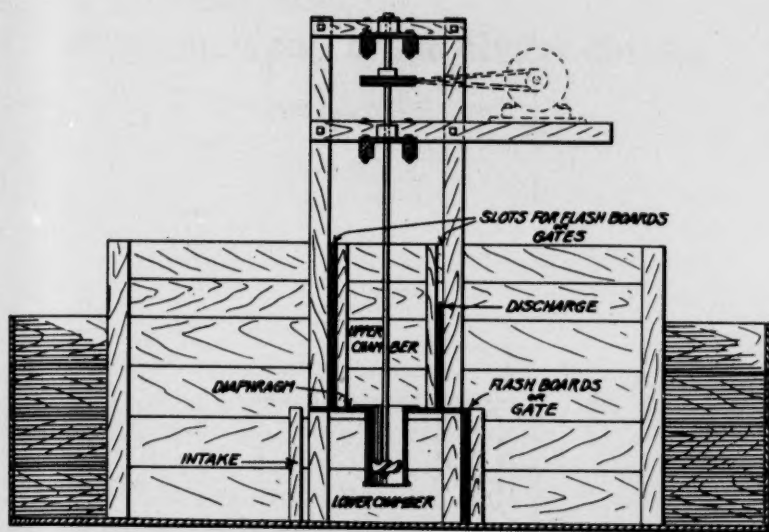
Ervin Howell, being duly sworn, deposes and says that he is of legal age and is one of the Petitioners herein; that he knows either personally or by reputation the various manufacturers of drainage and irrigation pumps sold in competition with those which he and the other Petitioner herein, Raymond Earl Gutermuth, manufacture and sell; and that the entire industry in such pumps is concentrated within the State of Florida within the Fifth Judicial Circuit of the United States.

Signed ERVIN HOWELL.

Sworn to and subscribed before me this 9th day of September, 1942.

(SEAL) MARIE COURSON,  
*Notary Public.*

Notary Public, State of Florida at Large.  
My Commission Expires Feb. 9, 1945.  
Bonded by American Surety Co. of N. Y.



*Drawing of Defendants' Exhibit No 5*